

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JASON B. LATIMER,

Petitioner,

v.

JEFFERY A. UTTECHT and
ROBERT FERGUSON,

Respondents.

NO: 4:14-cv-05116-SAB

ORDER *SUA SPONTE* DISMISSING
PETITION AS TIME BARRED

BEFORE THE COURT is Petitioner's timely Response, ECF No. 4, to the Order to Show Cause why this petition should not be dismissed as time barred, ECF No. 3. Attorney Gerald R. Smith represents Petitioner Jason B. Latimer, a Washington State prisoner. The Court has not directed service of process on Respondents. The Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 was filed on October 31, 2014. The filing fee has been paid.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an inmate must seek federal habeas relief within one year after direct review concludes or the time for seeking such review expires. 28 U.S.C. §

ORDER *SUA SPONTE* DISMISSING PETITION AS TIME BARRED -- 1

1 2244(d)(1)(A). In response to the Order to Show Cause, counsel argues that the
2 concepts of finality and exhaustion and the “various procedures for post-conviction
3 relief in the states result in denial of equal rights and due process for petitioners
4 depending on the state in which they were convicted.” ECF No 3 at 3. Counsel
5 contends that “[28] U.S.C. § 2244(d)(2) is unconstitutional as written and
6 interpreted by the courts because it denies equal protection of the laws.” ECF No.
7 3 at 3. Petitioner, however, has presented no facts showing that he has been treated
8 differently than similarly situated litigants.

9 Counsel invites the Court to consider a recent Ninth Circuit decision,
10 *McManagle v. Meyer*, in support of his contentions. 766 F.3d 1151 (9th Cir. 2014).
11 As noted by counsel, California’s State appellate system is unique. In *McManagle*,
12 the Ninth Circuit limited its holding to “the context of California misdemeanants
13 who are required to file a state habeas petition in order to both reach the state court
14 of last resort and fully exhaust their claim before seeking relief in federal court.”
15 *Id.* at 1155. The Court noted that “seeking habeas review of a misdemeanor in the
16 California Supreme Court is, for the purposes of federal law, *de facto* part of the
17 direct review process.” *Id.* at 1156.

18 In Washington, an appellant challenging his criminal conviction on direct
19 appeal may file a petition for review in order to reach the court of last resort, the
20 Washington State Supreme Court. *See* RAP 13.4(a), Washington Rules of

1 Appellate Procedure. For reasons that have not been explained, Mr. Latimer did
2 not avail himself of this opportunity.

3 According to the petition, Mr. Latimer was sentenced in Grant County on
4 January 19, 2010. Counsel further indicated that the convictions for first and
5 second degree assault, each with firearm enhancements, were affirmed by the
6 Washington State Court of Appeals, Division III, on June 16, 2011. ECF No. 1 at
7 2. This date was accepted for the analysis in the Order to Show Cause, but this was
8 error.

9 A review of the unpublished opinion affirming Petitioner's convictions
10 reveals that the Court of Appeals of Washington, Division III, issued its decision in
11 cause number 28798-0-III, on May 5, 2011.¹ See 161 Wash.App. 1030, 2011 WL
12 1679015. ² Counsel has also indicated that the convictions were affirmed on May

13 _____
14 ¹ An unsigned, undated copy of this same unpublished opinion is also attached to
15 the Petition under Appendix B, but is designated, "Order Dismissing Personal
16 Restraint Petition." It appears that this document was attached in error. Counsel
17 references "App. B, Order at 8" on page four of the petition, but the attached Order
18 consists of only seven pages.

19 ² Judicial notice may be taken of court records. *Valerio v. Boise Cascade Corp.*, 80
20 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir. 1981).

1 5, 2011, in an unpublished opinion, and that the mandate was filed on June 16,
2 2011. *See* ECF No. 1, Appendix A at 32. As noted in the Order to Show Cause, "it
3 is the decision of the state appellate court, rather than the ministerial act of entry of
4 the mandate, that signals the conclusion of review." *See Wixom v. Washington*, 264
5 F.3d 894, 897-98 (9th Cir. 2001).

6 Petitioner makes no assertion that he then sought further direct appellate
7 review in the Washington State Supreme Court and there is no record indicating
8 that he did so. When a prisoner does not seek review in the State's highest court,
9 judgment becomes final on the date that the opportunity to seek such review
10 expires. *Gonzalez v. Thaler*, 132 S.Ct. 641, 646 (2012). Therefore, Petitioner had
11 thirty days from May 5, 2011, in which to file a petition for discretionary review.
12 *See* RAP 13.4 (a).

13 Counsel has offered none of the statutory bases to delay the onset of the
14 federal limitations period under 28 U.S.C. § 2244(d)(1)(B)-(D). Therefore, the
15 federal period of limitations commenced on June 4, 2011, and expired before the
16 Personal Restraint Petition was filed on June 18, 2012. The present Petition is
17 untimely. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) ("section
18 2244(d) does not permit the reinitiation of the limitations period that has ended
19 before the state petition was filed.").

1 Counsel argues that a state Personal Restraint Petition should be considered
2 “pending” before it is filed. ECF No. 3 at 6. He contends that 28 U.S.C. §
3 2244(d)(2) fails to take into consideration the fact that a Washington petitioner has
4 a year to file for state collateral review and that this time is necessary to fully
5 investigate, research and perform other tasks to ensure full exhaustion.

6 Petitioner’s arguments are precluded by Ninth Circuit precedent. *See Nino v.*
7 *Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), *overruled on other grounds by*
8 *Harris v. Carter*, 515 F.3d 1051, 1053 (9th Cir. 2008) (“AEDPA’s statute of
9 limitations is not tolled from the time a final decision is issued on direct state
10 appeal and the time the first state collateral challenge is filed because there is no
11 case ‘pending’ during that interval”). Although filing of collateral proceedings may
12 toll the running of the limitations period, it does not affect commencement of the
13 running of the limitations period. *See Banjo v. Ayers*, 614 F.3d 964, 968–69 (9th
14 Cir. 2010) (discussing tolling due to collateral review proceedings).

15 Even if the Court were to find that Petitioner’s efforts to investigate,
16 research and file his Personal Restraint Petition somehow tolled the running of the
17 federal limitations period, counsel offers no explanation for the more than eighteen
18 months which elapsed between when the Washington courts completed review of
19 Mr. Latimer’s Personal Restraint Petition on April 12, 2013 and before his federal
20 habeas petition was filed on October 31, 2014. After careful review of the record,

1 the Court finds that Petitioner has failed to show cause why this action should not
2 be dismissed as time barred under 28 U.S.C. § 2244(d).

3 Therefore, **IT IS ORDERED** the habeas petition is **DISMISSED with**
4 **prejudice** as untimely. The District Court Executive shall enter this Order, enter
5 Judgment, and forward copies to counsel for Petitioner. The Court further certifies
6 that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. §
7 2253(c); Fed. R.App. P. 22(b).

8 **DATED** this 10th day of December 2014.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

13 Stanley A. Bastian
14 United States District Judge
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